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No. 02-

IN THE

# Supreme Court of the United States

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN, and LINDA BROSNAHAN,

*Petitioners,*

*v.*

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This is like an intersection case in which the defendant repeatedly admits to running a red light, then secures summary judgment on the issue of negligence based on an (appellate) finding that the light was green. In granting summary judgment below, the Third Circuit reached conclusions of fact and law that are shockingly inconsistent with the undisputed record — even to the point of effectively holding that the coming of October 2000 preceded in time the coming of December 1999, and that the plain meaning of "is" is "was." The overarching question, then, is whether a court of appeals engages in meaningful appellate review when (to all appearances) it fails to even acquaint itself with the undisputed record facts. More specifically:

1. Does the summary judgment standard allow a court of appeals to disregard wholesale the undisputed material facts, where those facts are favorable to the nonmoving party?

2. Does an objective review of the opinion and record below compel the conclusion that the Third Circuit purported to resolve this appeal without either reading the petitioners' briefs or acquainting itself with the undisputed record facts?

3. Does this Court's supervisory function require it to remand the case for actual (and meaningful) appellate review?

4. Did the Third Circuit err in ignoring (and, by implication, rejecting) the Ninth Circuit's holding in *Travelers Indem. Co. of Ill. v. Ins. Co. of North America*, to the effect that where a liability insurer makes payment of indemnity on a claim, equity precludes its contesting the duty to defend that claim?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Brosnahan Builders, Inc. has no corporate parent, and there is no publicly held company owning ten percent or more of its stock.

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Petitioners Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan (collectively, the "Brosnahans") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The district court's March 30, 2001 memorandum opinion is published at 137 F. Supp. 2d 517, and reproduced in the accompanying appendix ("App.") at pages 6a-28a. The district court's January 18, 2002 order denying petitioners' motion to alter or amend the judgment is reproduced at pages 29a-30a of the appendix, but not otherwise published. The Third Circuit's January 21, 2003 opinion, and its March 6, 2003 order denying rehearing, appear at pages 1a-5a and 31a-32a of the appendix; neither is otherwise published.

## STATEMENT OF JURISDICTION

The opinion and judgment for which review is sought were issued by the Third Circuit on January 21, 2003. By its order dated March 6, 2003, the Third Circuit denied rehearing. This petition is thus timely, having been filed within ninety days of the order denying rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

This is an action for declaratory judgment, breach of contract and other relief. It arises under a policy of general liability insurance issued to the Brosnahans by respondent Harleysville Mutual Insurance Company ("Harleysville").

For the purposes of this petition, the principal relief sought is a declaration that Harleysville is liable for the costs of defending the Brosnahans in an underlying lawsuit titled *Pinkert v. John J. Olivieri, P.A.*, C.A. No. 99-380SLR (D. Del.).

The court of appeals' opinion merits review because it is not the product of a rational and orderly judicial process; because it has deprived the Brosnahans of both substantive and procedural due process; and because it does violence to the summary judgment standard. The issues are not ones of pedestrian legal error, because the court of appeals' analysis is simply not explicable in those terms. Rather, its analysis turned on discrete questions of fact — like whether a particular event happened in December 1999 or October 2000, or whether a certain written agreement was procured by fraud — that were undisputed between the parties. Yet in each instance, the court of appeals reached conclusions contrary to the undisputed record; and did so without explanation, or even the slightest intellectual nod to the true facts.

Consider the first of the examples cited above. The court of appeals was presented with the question of whether Harleysville had received notice of a particular fact in December 1999 (as the Brosnahans contended) or in October 2000 (as Harleysville's lawyers contended). The document that constituted the notice was featured prominently in the Brosnahans' briefs below, and clearly bore a December 1999 date. The Brosnahans further presented the sworn deposition testimony of two Harleysville designees, testifying under Federal Rule of Civil procedure 30(b)(6), through which Harleysville repeatedly admitted that it received the notice in December 1999. (As if to erase any doubt, one designee

stated flatly that Harleysville's earlier statements to the contrary were untrue.) Harleysville's answering brief made no mention of this evidence, even in rebuttal; and the Third Circuit concluded, without explanation, that the notice was received in October 2000. (As shown below, that conclusion was fatal to the Brosnahans' appeal.)

Is this ordinary error? Standing alone it might be, though of an egregious sort. But it does not stand alone. The Third Circuit's opinion is a patchwork of objective misstatements, wrong conclusions and departures from the undisputed record. It is explicable only as the product of a grossly subverted process: one in which the Third Circuit read the district court's memorandum opinion, consulted Harleysville's answering brief, and then rendered decision — without reading the Brosnahans' opening or reply briefs, or hearing the Brosnahans at oral argument.[1]

In short, review by this Court would constitute the first and only meaningful appellate review in the case.

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1. The Third Circuit's failure to consult, in any meaningful way, the Brosnahans' briefs and appendix below is reflected in one other feature of its opinion. That is, the Third Circuit makes a single passing reference to an argument raised by the Brosnahans before the district court, and memorialized by that court in denying the Brosnahans' motion to alter or amend the judgment. *Compare* App. 3a *with* App. 30a (noting, in both cases, waiver argument). But nowhere does the Third Circuit refer to any other fact, legal position or authority argued by the Brosnahans in their Third Circuit briefs. Had the Third Circuit been offering an advisory opinion, and had it solicited Harleysville's input without allowing the Brosnahans to even appear, the opinion would read no differently than it does today.

## A. Proceedings in the District Court

The underlying *Pinkert* case was commenced in the district court in June 1999. It sought recovery of damages and other relief as against Brosnahan Builders, the Brosnahans and others in connection with the construction of a residential home in Bethany Beach, Delaware. Attempts by the Brosnahans to persuade Harleysville to defend them in the *Pinkert* case were unsuccessful; and this coverage litigation ensued.

The Brosnahans filed their complaint against Harleysville in the district court on May 24, 2000. Jurisdiction in that court rested on the diversity statute, 28 U.S.C. § 1332. The Brosnahans' complaint was directed solely to the duty to defend; and indeed, the Brosnahans have never sued Harleysville on the duty to indemnify.

On August 24, 2000, the Brosnahans moved for summary judgment on the duty to defend. Harleysville opposed the motion, and simultaneously filed its own cross-motion on the duty to defend. Harleysville also purported to move on the duty to indemnify, though that issue had never been joined in the pleadings. It further cross-moved on its argument (in the alternative) that any defense costs should be "apportioned" between Harleysville and the Brosnahans. Because the Brosnahans viewed the "apportionment" argument as an affirmative defense, and because it had never been pled by Harleysville, the Brosnahans moved to strike the argument on October 12, 2000. Thereafter, on February 5, 2001, the Brosnahans filed a conditional motion for summary judgment on their claim of bad faith breach of contract (conditional, that is, on the success of their "duty to defend" motion).

On March 30, 2001, the district court issued its memorandum opinion and order, denying the Brosnahans' motion for summary judgment on the duty to defend; granting Harleysville's cross-motion on the same issue; and denying as moot the Brosnahans' motion to strike and conditional motion for summary judgment on the bad faith issue. In its memorandum opinion, the district court held as follows:

• ***The "human agency" issue.*** The district court held that the *Pinkert* complaint did not allege the happening of an accident, so that the policy's requirement of an "occurrence" was not met. Its reasoning was simple, if startling: "The situation that led to the damage to the Pinkerts' home was clearly within the control of plaintiffs, as general contractor of the construction project, and not a fortuitous circumstance happening 'without human agency.'" App. 23a. In other words, the district court concluded that liability insurance must be reserved for events happening without human agency.

The logical consequence of this analysis — which is now the law of the Third Circuit — is that no actor's active negligence is insurable against third party liability. Drivers whose negligence behind the wheel causes injury to others act with human agency; so do surgeons guilty of medical negligence. But they should no longer turn to their liability insurers unless, say, an earthquake intervenes.

Lost in the district court's "human agency" analysis, meanwhile, was the fact that the *Pinkert* complaint alleged negligence against each of the Brosnahan insureds. Lost, too, was the (previously) universal standard for determining the presence or absence of an "accident" under general liability policies: whether the damage was expected or intended from

the standpoint of the insured. *See Nationwide Mut. Fire Ins. Co. of Columbus v. Pipher*, 140 F.3d 222, 228 (3d Cir. 1998) (Alito, J. concurring) (accidental damage under a general liability policy is that which is unintentionally caused). *See also* BARRY R. OSTRAGER AND THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.02[b] (11th ed. 2002) (collecting ten reported decisions for the proposition that "[t]he term 'accident' means unexpected and unintended.")

This last error was all the more critical because elsewhere in its opinion, the district court acknowledged that the *Pinkert* complaint ***did not*** allege expected or intended damage. That is, the district court held that the policy's Exclusion (a), which bars coverage for property damage "expected or intended from the standpoint of the insured," did not apply: "[T]he court concludes that since the *Pinkert* complaint alleges liability without intent, Exclusion 'a' does not apply." App. 25a. If the district court had simply applied this finding to the applicable legal standard, the Brosnahans would necessarily have prevailed on the "accident" issue.

• ***The "professional services" exclusion***. The district court found that the policy's Exclusion (j) (the "professional services" exclusion) bars coverage, because (a) the Brosnahans used subcontractors in effecting the underlying construction, and (b) by failing to adequately supervise those subcontractors, the Brosnahans rendered defective "professional services" within the exclusion's meaning.[2]

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2. The *Pinkert* complaint makes no mention of the Brosnahans' use of subcontractors. In looking to the extrinsic fact of the subcontractors' involvement for purposes of Exclusion (j), it appears that the district court drew on its substantive knowledge of the actual facts of the *Pinkert* case (as opposed to the facts pled in the *Pinkert* complaint).

This holding was nearly as startling as the district court's "human agency" analysis. The policy, after all, is a dedicated insurance product for building contractors. Indeed, it bears the title "Contractor's Business Owners Policy." Hardly a construction project goes forward in America without the help of subcontractors; and if the use (and necessary supervision) of subcontractors places coverage out of reach, then the policy is rendered an illusory contract. Small wonder that at its Rule 30(b)(6) deposition, Harleysville admitted that Exclusion (j) does not apply.

• ***The meaning of "is."*** The district court held that Exclusion (k)(5) (which applies only where the Contractor "***is performing*** operations") also bars coverage, because the Brosnahans "***were performing*** 'operations' . . . ." App. 26a (emphasis added). It thus effectively held that the plain meaning of "is" is "was."

Significantly, the Brosnahans had served Harleysville with contention interrogatories, asking it to identify all policy exclusions on which it relied for its denial of coverage. In response, Harleysville identified just three exclusions (or one fewer than the district court ultimately upheld). Exclusion (k)(5) was not among them.

• ***The "your work" exclusion***. The district court also upheld Exclusion (m), the "your work" exclusion. It did so despite the exclusion's express exception for claims targeting the work of subcontractors, and despite the fact that (as Harleysville has repeatedly conceded) the *Pinkert* complaint does target the subcontractors' work. It reasoned that (a) though the *Pinkert* complaint indeed attacks the subcontractors' work, it does not mention the subcontractors by name, and (b) neither Harleysville nor the court could

properly consult facts extrinsic to the *Pinkert* complaint (like the identity of subcontractors) for purposes of the duty to defend.[3] In so holding, the district court ignored (as the Third Circuit would later ignore) more than fifty reported decisions for the proposition that where "an insurer obtains information [here, regarding the involvement of subcontractors] from which it appears that there might be coverage . . . the company has a duty to defend, even if the allegations of the complaint themselves would not give rise to such a duty." ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 4.03 (3d ed. 1995). *And see id.* (collecting cases to the same effect).[4]

• ***The "impaired property" exclusion***. The district court last found that Exclusion (n) (the "impaired property" exclusion) applies. It based this holding on its conclusion that the Brosnahans' work product (as general contractor) was "impaired" in the sense that it was defective: "Because the Pinkert's residence is 'impaired property,' Exclusion 'n' applies to the claim and excludes it from coverage under the policy." App. 28a. But the district court failed to consider that "impaired property" is a specially defined term within the policy. Under that special definition, "impaired property" means "tangible property, ***other than*** 'your product' or 'your work' . . . ." Under the policy's separate definition of "your

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3. Here the district court ignored the actual, undisputed facts in favor of a "four corners" approach. When we combine this analysis with the district court's separate treatment of Exclusion (j), we see a new doctrine emerge (the "insurer's election" doctrine?) to this effect: that the insurer may rely on facts extrinsic to the underlying complaint to defeat the duty to defend, while ignoring extrinsic facts that trigger the duty to defend.

4. Professor Windt appeared in the case as Harleysville's testimonial expert on insurance issues.

work", the entire project was the Brosnahans' work — and naturally enough, since they served as general contractor. Indeed, Harleysville's Rule 30(b)(6) designee admitted that the entire Pinkert residence was the work of the Brosnahans under the "your work" definition.

In other words, the district court found that the Brosnahans' work product (the residential home) was "impaired property", so that the exclusion would apply. But the policy's definition of the term makes clear that the Brosnahans' work product can ***never*** be impaired property (and Harleysville agrees).

* * *

On April 13, 2001, the Brosnahans moved to alter or amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(e). Thereafter, on July 12, 2001, Harleysville secured the Brosnahans' dismissal from the *Pinkert* case in return for a payment by Harleysville of $170,000 to the Pinkerts. Thus, in a case in which the trial court had only just ruled that there could be no ***possibility*** of indemnity coverage — for this is what it means to deny the duty to defend — Harleysville voluntarily made a six-figure indemnity payment.

Believing that Harleysville's indemnity payment constitutes a waiver of any right to contest the duty to defend, the Brosnahans sought leave to supplement their Rule 59(e) motion on the waiver issue.

Finally, on January 18, 2002, the district court entered its Rule 59(e) order. That order upheld the district court's prior analysis on the "occurrence" issue, and on Exclusions

(k)(5), (m) and (n). It granted the Brosnahans' motion for leave to file a supplemental submission on the waiver issue (which the Brosnahans had previously filed, on a conditional basis); but held that no waiver had been made. Significantly, it reversed the district court's earlier ruling on Exclusion (j) (the "professional services" exclusion), reliance on which Harleysville had since abandoned. App. 29a-30a.

The Brosnahans filed their Notice of Appeal on February 1, 2002.

**B. Proceedings in the Third Circuit**

The Third Circuit affirmed the district court's decision on January 21, 2003. Everything about the opinion confirms the basic thrust of this petition: that this appeal simply fell through the Third Circuit's administrative cracks, and that (in particular) the Third Circuit never read the Brosnahans' briefs, never considered their arguments, and never acquainted itself with the undisputed facts.

The opinion is just five pages long. The first three pages are devoted almost exclusively to the case caption, a summary of the procedural history, and a statement of the standard of review. The fifth page, meanwhile, sets forth only the Circuit Judge's conformed signature. Thus, the Third Circuit's entire legal analysis on the multiple issues presented by the Brosnahans' appeal was set forth in a single paragraph on page 4 (shown here at App. 4a). No mention was made of the term "human agency", though that concept was the linchpin of the district court's "accident" analysis. No mention was made of the district court's construction of "is" as "was", or the related "present tense vs. past tense" debate under Exclusion (k)(5). No mention was made of Exclusion (m) whatever, or its

exception for claims targeting the work of subcontractors. And no mention was made of the policy's special definition of "impaired property", or Harleysville's binding admission that the "impaired property" exclusion cannot apply.

But that is not all. A comparison of the Brosnahans' briefs to the Third Circuit's skeletal analysis confirms that the court ignored critical, uncontroverted evidence on a host of issues, along with unchallenged legal authorities that were directly on point — and all this while purporting to adhere to the standards for summary judgment.

1. ***The waiver issue***. The Third Circuit was asked to decide whether Harleysville's voluntary payment of indemnity under the policy (to the tune of $170,000) waived its right to contest the duty to defend. In resolving this issue — to which it devoted barely one page of analysis — the court stated conclusions of fact that are shockingly inconsistent with the undisputed record. It also ignored a reported decision of the Ninth Circuit, directly on point.

The Third Circuit rejected the waiver argument for two reasons. First, the court explained, "the Brosnahans and Harleysville executed a non-waiver agreement which permitted Harleysville to investigate the Pinkerts' claim and reserve all of Harleysville's rights under the commercial general liability policy." App. 4a. Second, "[w]hen the Brosnahans filed a third-party complaint against subcontractors in October 2000, Harleysville was presented for the first time . . . with the possibility that subcontractors negligently and accidentally caused damage to the building." *Id.* But Harleysville admits that the non-waiver agreement was procured through fraud and deceit; and it has repeatedly admitted that it learned of the subcontractors' role, and the underlying complaint's targeting of that role, in December 1999.

When the Brosnahans first notified Harleysville of the underlying claim, Harleysville forced them to sign a non-waiver agreement. They did this by threatening total inaction on the claim; that is, by telling the Brosnahans that if they failed to sign, no investigation would ever take place:

> Without a non-waiver being executed and returned, Harleysville will be unable to reach a determination as to the claim currently being presented.

(February 1, 1999 letter from Harleysville to the Brosnahans.) This was a fraud:

> Q: Okay. Now, that representation that Harleysville made to the Brosnahans in this February 1, 1999, (sic) letter, that was false, wasn't it, sir?
>
> * * *
>
> A: I would have to answer that that's correct.
>
> Q: Okay. And it was false because whether or not the Brosnahans signed any new contract at all or whether they said we're not signing anything, we've already paid you a premium, we've already got a contract with you, Harleysville had a duty to investigate fully and fairly, anyway?
>
> A: That's correct.

(Testimony of Harleysville's designee under Federal Rule of Civil Procedure 30(b)(6), R. Slomiany.) Harleysville's

designee likewise admits that the company never told the Brosnahans that if they signed the non-waiver contract, they would surrender legal rights.[5]

Harleysville thus forced its consumer insureds to sign a second (non-waiver) contract through intimidation and deceit. Had the Brosnahans refused to sign, they were told, Harleysville would refuse in turn to even consider the claim; while signing would lead (as we now see) to the compromise of important legal rights. This evidence — which essentially establishes fraud and extortion by Harleysville — could not properly be ignored on summary judgment. Yet the Third Circuit did just that.

The second ostensible basis for rejecting the waiver argument lay in the assertion that Harleysville learned of the subcontractors' role for the first time in October 2000. But this is simply false.

In December 1999 the Brosnahans wrote to Harleysville asking that their claim be reconsidered. The letter left no doubt about the role of subcontractors, or whether the subcontractor's exception had been triggered:

> The *Pinkert* complaint correctly alleges that Brosnahan Builders acted as general contractor for construction of the beachfront home. Brosnahan Builders was assisted, however, by subcontractors. Indeed, subcontractors were involved in applying the fiberglass jellcoat for waterproofing of portions of the Pinkerts'

5. The purpose of Rule 30(b)(6) "is to create testimony that would bind the corporation." *Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991).

> home; and they were likewise involved in the installation and finishing of drywall and finish. This "subcontractor" work is squarely targeted by the complaint. * * * Reading the complaint (as we must) in a light most favorable to Harleysville's insureds, it is clear that the "subcontractor's exception" to Exclusion "m" has been triggered. Accordingly, the exclusion does not apply.

Significantly, the December 1999 letter identified specific paragraphs in the underlying complaint that targeted the subcontractors' work.

Harleysville's 30(b)(6) designees have repeatedly confirmed that with its receipt of the December 1999 letter, Harleysville knew that the underlying complaint targeted the work of subcontractors:

> Q: In my December 22, 1999, (sic) letter I told Harleysville in plain English that subcontractors were involved in building the Pinkert home, didn't I?
>
> A: On page 6, yes, you did.
>
> Q: So from that point forward, Harleysville could never again claim ignorance as to whether subcontractors were involved in building the Pinkerts' home. Is that fair to say?
>
> A: I would think that's a correct statement, yes.
>
> * * *

Q: Didn't I tell Harleysville in plain English on December 22, 1999, that the subcontractors' work was targeted by paragraphs 32(i) and 32(k) of the complaint?

A: That's what you're saying in this letter, yes.

Q: And that's said rather clearly in the letter, isn't it, sir?

A: You are quite clear, yes.

Q: So when Harleysville received and read this letter in December of 1999, from that point forward, it could no longer claim ignorance that the work of the subcontractors was targeted by the Pinkert complaint at paragraphs 32(i) and 32(k). Is that fair to say?

A: I would think that's fair to say, yes.

(Further testimony of Harleysville's designee, R. Slomiany.) A second designee, Jamie Bruner, was the very employee through which Harleysville claimed to have learned of the subcontractors' role in October 2000. It was she who — unaware of the December 1999 letter, because her superiors in the home office never forwarded it to the file — wrote to the Brosnahans on October 16, 2000 to this effect: "We have recently learned that there were subcontractors involved and there is a possibility of resultant damages being claimed." But testifying on Harleysville's behalf, Ms. Bruner admitted that this statement — that Harleysville "recently learned" of the subcontractors' role as of October 2000 — was untrue:

Q: Now that you know that [the Brosnahans' December 1999 letter to Harleysville] does exist,

> would you agree with me that when you told the policyholders in October 2000 that Harleysville had recently learned that subcontractors were involved, that that was — that was not a true statement?
>
> A: Correct.

The Third Circuit ignored this critical evidence, finding that Harleysville was unaware of the subcontractors' involvement prior to October 2000: "When the Brosnahans filed a third-party complaint against subcontractors in October of 2000, Harleysville was presented for the first time, through the averments in the third-party complaint, with the possibility that subcontractors negligently and accidentally caused damage to the building." App. 4a.[6]

The Third Circuit's waiver analysis is also directly contrary to the Ninth Circuit's holding in *Travelers Indem. Co. of Ill. v. Ins. Co. of North Amer.*, No. 98-56276, 2000 WL 278390 (9th Cir. March 14, 2000) ("*Travelers v. INA*"). There the insurer contributed toward settling the underlying claims, then balked at paying a proportionate share of the underlying defense costs. The Ninth Circuit held that equity required the insurer to pay for the defense. And why? Because as a matter of equity, payment of indemnity waives any right to contest payment of defense costs:

> INA participated in a settlement in each of the three lawsuits, acknowledging that its policy covered the

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6. Ironically, the district court did ***not*** find that Harleysville learned of the subcontractors' role for the first time in October 2000; it ruled instead (though incorrectly) that Harleysville was free to ignore the true facts. The Third Circuit thus compounded its error by reaching a factual question of first impression. But the larger point (and a fairly objective one, we think) is that December 1999 precedes October 2000 by ten full months.

> claims of property damage. Therefore, "equity overrides the terms of the insurance policies. . . ."

*Travelers v. INA*, 2000 WL 278390, at *3 (citation omitted).

It could hardly be otherwise. The duty to defend is far broader than the duty to indemnify; and no insurer can contest the ***possibility*** of an indemnity obligation — all that is needed to trigger the duty to defend — when it pays full indemnity. Indeed, so absurd is the result here that we respectfully challenge any competent legal researcher to find any other case, in any jurisdiction, permitting an insurer to contest the duty to defend after paying full indemnity.

2. ***The "occurrence" issue***. The Third Circuit held that the underlying *Pinkert* complaint did not allege an "occurrence" (or "accident") because it essentially pled just breach of contract and defective workmanship. It reached this conclusion despite the fact that Harleysville, in its answering brief, agreed that the *Pinkert* complaint asserted claims of negligent misrepresentation against each of the three Brosnahan insureds.

But the Third Circuit's conclusion is more remarkable still when one considers that two of those insureds, Kevin and Linda Brosnahan, never entered into any contract with the Pinkerts; never supplied any "workmanship" to the Pinkerts; and were never sued by the Pinkerts for either breach of contract or defective workmanship. Rather, they were simply sued for alleged misrepresentations regarding the quality of Brosnahan Builders' work. Thus, in addition to ignoring the *Pinkert* complaint's express counts for negligence as against all three insureds, the Third Circuit created an underlying breach of contract claim against two of those insureds where no contract existed. None of this is remotely consistent with the summary judgment standard.

3. ***The meaning of "is" redux***. The Third Circuit's entire discussion of the disputed policy exclusions is set forth in a single sentence: "The district court also found that Exclusions k(5) and (n) apply to bar coverage . . . thus precluding any duty to defend. . . ." App. 3a (citation omitted). But in fact, neither exclusion applies, and this is (or should have been) clear from the exclusions themselves.

Exclusion (k)(5) applies only to claims of property damage to real property "on which you or any contractor or subcontractor working . . . on your behalf ***is performing operations***. . . ." The exclusion is thus written in the present tense, and purposefully so — after all, subdivision (6) of the same exclusion refers to work that "was . . . performed. . . ." Yet the district court interpreted Exclusion (k)(5) in the past tense: "The Pinkerts' home is considered 'real property,' and plaintiffs, themselves or through subcontractors, ***were performing*** 'operations' on that property." App. 26a (emphasis added). This is manifestly wrong.

First, courts interpreting the exclusion have held that it "is written in the present tense and must be construed to bar coverage for a contractor's work ***only at the time the work is being performed.***" *American Mercury Ins. Group v. Urban*, No. 00-2122-DJW, 2001 WL 1723734, at *8 (D. Kan. May 23, 2001) (emphasis added). Second, the *Pinkert* complaint clearly alleged property damage (in the form of continuing water leaks and other damage) occurring ***after*** the Brosnahans completed their work. It alleged, for example, that the plaintiffs took up residence in November 1998 — meaning that for purposes of the policy, the Brosnahans' work was completed as of that date.[7] And the district court concluded as much: in its analysis of Exclusion

7. The policy expressly provides that the contractor's work is deemed complete when put to its intended use.

(k)(6), it found that "the Pinkerts' home was complete when the property damage occurred. . . ." App. 26a. In sum, the *Pinkert* complaint must logically be read to allege property damage arising after the plaintiffs first moved in. And all such property damage — that is, any portion occurring after the Brosnahans completed or abandoned their work — would be beyond Exclusion (k)(5)'s reach.

It is fundamental that a policy exclusion written in the present tense must be read in the present tense — particularly where (as here) it is supplied by the insurer. The Third Circuit failed to do this, apparently in ignorance of both the exclusion's express terms and the Brosnahans' briefing on the subject. This is not how summary judgment should proceed.

4. ***The meaning of "other than."*** Exclusion (n) applies only to "impaired property" or "property that has not been physically injured. . . ." The district court upheld the exclusion on the first ground, but not the second: "Because the Pinkert's residence is 'impaired property,' Exclusion 'n' applies to the claim and excludes it from coverage under the Policy." App. 28a. But the policy defines "impaired property" to mean "tangible property, ***other than*** 'your product' or 'your work'. . . ." Because the Brosnahans served as general contractor, the entire project is their work:

> Q: Okay. The entire house is the work of Brosnahan Builders because they are the general contractor?
>
> A: Correct.

* * *

> Q: Well, under ordinary circumstances, can we agree that if a general contractor builds a house, then whether or not he uses subcontractors, all the work is done by him or on his behalf?
>
> A: I think that's a fair statement, yes.

(Testimony of Harleysville's designee, R. Slomiany.) *And cf. Blaylock and Brown Construction, Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. Ct. App. 1990) (noting that a general contractor "can employ subcontractors or use employees to do the work, but in the end, when the work is completed, all the work called for by the contract on the part of the contractor must be deemed to be work performed by the contractor.") Thus, the "impaired property" exclusion could never apply to the Brosnahans' work.

None of this should have escaped the Third Circuit, because it was all featured prominently in the Brosnahans' briefs. Certainly the Third Circuit should never have granted summary judgment on a policy exclusion without first familiarizing itself with the exclusion's terms. Yet it is plain that the Third Circuit did just that, because the terms of Exclusion (n), and its clear use of the words "other than", would necessarily have led the Court to an opposite result.

5. ***The rubber stamp***. The key to understanding the Third Circuit's approach lay in its fulsome praise for the district court's opinion: "In its Memorandum Opinion, the district court carefully and completely explained its reasons for finding that Harleysville had no duty to defend the Brosnahans in the underlying *Pinkert* action, and we can add little to the district court's thoughtful analysis." App. 3a. No fair-minded observer with any grasp of the issues could

harbor such sentiments. Again, the district court upheld one exclusion, Exclusion (j), that Harleysville itself admits is inapplicable. It stated clearly that just three exclusions (Exclusions (j), (k)(5) and (n)) barred the claim, then upheld a fourth exclusion (Exclusion (m)) seven pages later. App. 20a, 27a. Its discussion of Exclusion (m), meanwhile, appears under the heading "Exclusion 'm' Does Not Apply to the Claim" — even though it ultimately held that the exclusion did apply. App. 27a. Far from being careful or thoughtful, the district court's opinion was confusing and confused.

The Third Circuit's praise for the district court's analysis underscores what the totality of the record makes clear: that the Brosnahans have been denied any meaningful appellate review.

* * *

The Brosnahans timely sought rehearing of the Third Circuit's decision, calling the court's attention to the evidence and authorities it failed to consider. The Third Circuit denied rehearing without elaboration. This petition followed.

## REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons.

***First***, the procedural integrity of summary judgment proceedings in the courts of appeals, and the substantive fairness of those proceedings, is uniquely a matter for this Court's review. That is why this Court has, over time, so carefully delineated the mechanics of summary judgment.

Nor can there be any question that the Third Circuit has departed from those standards. The standard for summary judgment mirrors the standard for judgment as a matter of law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); and both require a review of all the record evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). *Accord, Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (on summary judgment, evidence must be taken "as a whole.") The Third Circuit could not properly grant summary judgment to Harleysville, or deny summary judgment to the Brosnahans, without considering (for example) Harleysville's admission that its non-waiver agreement was procured by deception; or its admission that it first learned of the subcontractors' involvement in December 1999; or that Kevin and Linda Brosnahan never entered into any contract with the Pinkerts; or that all three Brosnahan insureds were expressly sued in negligence, etc.

Whether the Third Circuit's departures from the summary judgment standard are unique to this case (on the one hand) or systemic (on the other) we cannot say. We can say that in this case, the departures were many in number and profound in their effect. Under the circumstances, there is every reason to expect similar departures from the summary judgment standard in future Third Circuit cases. Review by this Court would forestall the problem.

***Second***, it should be clear that the Brosnahans have been denied any meaningful appellate review, and so denied both procedural and substantive due process. When a court does what the Third Circuit has done here — disregarding undisputed material facts wholesale in the context of summary judgment — it strays far from the usual and

accepted course of judicial proceedings. By exercising its supervisory power, this Court can restore integrity to the process. SUP. CT. R. 10(a).

***Third***, the Third Circuit's decision conflicts with the Ninth Circuit's holding in *Travelers v. INA* on a matter of the federal courts' equity jurisdiction. Again, *Travelers v. INA* held that where a liability insurer pays indemnity, equity works a waiver on its right to contest the duty to defend. *Travelers v. INA*, 2000 WL 278390, at *3. Under the Third Circuit's ruling, equity has no place in the analysis whatever. This conflict is real and direct; and relating as it does to the court of appeals' equity jurisdiction, is a matter of genuine importance.

## CONCLUSION

The petitioners consist of a husband, his wife, and their small family-owned business. The disputed defense costs total roughly $200,000 — from the petitioners' perspective, a staggering sum. They have now spent half that again in this lawsuit, in a failed effort to persuade the federal judiciary that December 1999 came before October 2000, and that "is" does not mean "was."

To be sure, the petitioners are disaffected litigants, if ever that breed existed. But this petition is less about the result below than the remarkable manner in which it was reached.

The conclusion compels itself that the court of appeals simply ignored vast portions of the record on summary judgment. The petitioners thus seek review in this Court for the purpose of remanding the matter for meaningful appellate review.

Respectfully submitted,

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